IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO 2781 OF 2003
IN
SUIT NO.4849 OF 1994

Shri Vijaykumar Madhukar Desai ..Plaintiff.
V/s
Shri Vallabhdas M. Shah & Ors. ..Defendants.

Mr. M.B. Meher i/b Mr. G.N. Salunke for the plaintiff.

Mr. J.P. Sen i/b Federal Rashmikant and Co. for the defendants.

CORAM : ANOOP V.MOHTA J.

DATE : 13TH SEPTEMBER, 2005.

P.C.

. This notice of motion has been taken out by the original plaintiff, whose suit was dismissed on 2nd December, 1999 by the Prothonotary and Senior Master, when it was listed for a direction under Rule 74 of Original Side Rules for filing Written Statement within 12 weeks from the summons upon defendants. The matter was on board and on an application by the defendants it was adjourned for filing written statement to 18/11/1999. The matter was not on board on 18/11/1999. It was on board on 25/11/1999. It was adjourned to 2nd December, 1999 for dismissal. On 2nd December, 1999, the matter was on board, the plaintiff and his advocates

were absent, therefore, the suit was dismissed for default. The advocate for the defendants was present on 2/12/1999 but there was no written statement filed on 2/12/1999. Therefore, it appears that the matter was in fact adjourned for filing of written statement of the defendants, but it was dismissed, as plaintiff and his advocate were absent. There was no compliance as such required to be made by the plaintiff or his advocates on that date. It was the obligation or requirement of filing of the written statement by the defendants, as the matter was adjourned for filing of the written statement.

2. Considering this, there is no reason to overlook the averments made by the plaintiff in the affidavit in support of the present notice of motion. In so far as delay part is concerned, in view of para 7, the case is made out by the plaintiff, that the Metropolitan Magistrate asked for production of a certified copy of the written statement at the time of final hearing/ disposal of the proceeding, after 7 years. Admittedly, the advocate for the plaintiff had filed search note and took search on 3/9/2003 and found that there was no written statement filed for 4 years, in spite of seeking

adjournment on that ground, and lastly the suit itself was dismissed on 2/12/1999, in absence of the advocate on the record. The present notice of motion thereafter taken out by the plaintiff within one month from the date of knowledge of the dismissed of the suit, after search note dated 3/9/2003. The present notice of motion has been taken out on 19th September,2003.

3. The present suit is for the possession. There is no dispute that section 145 Cr.P.C. proceeding for the possession was also pending at the relevant time. Considering the nature of the proceeding, and as it related to the possession suit.

4. I am inclined to grant notice of motion as prayed in terms of prayer clause (a), (b) and (c).The notice of motion allowed accordingly.

5. The defendants shall file written statement, if any , within a period of six weeks from the date of order. However, it is subject to payment of cost of Rs. 5000/-, as a condition precedent to be paid within 4 weeks.

[ANOOP V. MOHTA, J.]